DOCUMENT RESUME

ED 270 805 CS 209 897

AUTHOR Gawley, Brian
TITLE "New York Times v. Sullivan" and Its Progeny: Was There a "Chilling Effect?"
PUB DATE Aug 86
NOTE 40p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (69th, Norman, OK, August 3-6, 1986).
PUB TYPE Speeches/Conference Papers (150) -- Historical Materials (060)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Court Judges; *Court Litigation; Cybernetics; Federal Courts; Freedom of Speech; *Newspapers
IDENTIFIERS *Editorial Policy; *Libel; *New York Times Co v Sullivan

ABSTRACT

In 1964 the United States Supreme Court issued a landmark decision, in the case of the New York Times v. Sullivan, that was hailed as a tremendous victory for the news media. This decision changed the law of libel by introducing a fourth requirement of "actual malice" in addition to three previously accepted requirements--publication, identification, and defamation. In examining 18 similar cases, the theoretical perspective used in this paper is cybernetics, the study of regulation and control in systems, with emphasis on the nature of feedback. Analysis of these 18 court cases, as well as consideration of a previously conducted study, suggests that there is presently a pattern of increased caution and responsibility on the part of newspaper editors in response to negative court decisions. However, it does not appear that this caution has reached the point where it would constitute a "chilling effect." (A list of libel cases succeeding "New York Times v. Sullivan," a copy of the advertisement that led to the suit, and a list of various practices adopted by newspapers to guard against potentially libelous letters are included.) (DF)

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New York Times v. Sullivan and its progeny: Was there a "chilling effect?"

by Brian Gawley

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The 1964 New York Times v. Sullivan Supreme Court decision changed the law of libel. The lawsuit grew out of an advertisement entitled "Heed Their Rising Voices." It was published in the March 29, 1960 edition of the New York Times. The ad stated the following:[2]

> "In Montgomery, Alabama, after students sang `My Country `Tis Of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of policemen armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested their dining hall was padlocked in an attempt to starve them into submission."

The ad continued:

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times--for `speeding,'`loitering,' and similar `offenses.' And now they have charged him with `perjury'-- a felony under which they could imprison him for ten years."

The ad contained the signatures of 84 public officials, including four black Alabama ministers (who denied they had given their approval) who were named as co-defendants in the libel suit, along with The New York Times. No Southern official had been named in the ad, but Sullivan, as Commissioner of Public Affairs and head of the police, said that he had been defamed by these two paragraphs in the ad.[3]

After both sides agreed that several statements in the ad were false or half-true,[4]a Southern Circuit Court jury awarded Sullivan $500,000. This decision was upheld by the Alabama Supreme Court.[5]

The trial judge instructed the jury that statements such as those made in the ad were "libelous per se," legal injury being implied without proof of actual damages, and that malice was presumed for the purpose of compensatory damges; therefore, such damages could be awarded against the petitioners if the statements were found to be published by them and to have related to the respondent.[6]

The United States Supreme Court reversed the decision ruling unanimously on March 9, 1964 the following:[7]

> "A State cannot under the First8 and Fourteenth9 Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves `actual malice'--that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false."

Justice William J. Brennan wrote:[10]

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and unusually sharp attacks on government and public officials."

The landmark decision was hailed as a tremendous victory for the news media. It began to be cited in an increasing number of lower court decisions; others now began to seek "New York protection," as it was called. Many of these cases ultimately reached the Supreme Court. The effects of these later decisions on the original 1964 ruling were the following:[11]

1. the term `public official' was variously defined, if only on an ad hoc basis, and ultimately expanded to include `public figures",
2. an `actual malice rule' was elaborated and clarified, and

3. a rationale was developed for distinguishing between, and according different treatment of, ordinary citizens and public officials/figures.

Eventually eighteen cases came to be regarded as part of the "New York Times family" of libel decisions.[12]

The New York Times v. Sullivan decision had changed the law of libel by introducing a fourth requirement of "actual malice" to the three originally needed for a libel suit (publication, identification, and defamation).[13] This fourth requirement originally applied only to public officials. However, it was extended later to public figures and private individuals in the 60's before being narrowed somewhat in the 70's. As more cases reached the Court, the Justices found it increasingly difficult to expand the "New York Times protection" and still maintain a "prima facie corrective of libel for those people who are victims of false statements of fact about their conduct and qualifications."[14]

This paper will examine whether the eighteen decisions of the "New York Times family" actually had a "chilling effect"[15] on the news media, contrary to the intent of the original New York Times v. Sullivan decision

The theoretical perspective to be used is cybernetics. Cybernetics is the study of regulation and control in systems, with emphasis on the nature of feedback. It deals with the way systems (along with their subsystems) use their own output to guage effect and make necessary adjustments.[16]

In this case, the system is the information system. It is a three-part system composed of a set of subsystems that interrelate to form the whole.[17] In the information system, these subsystems are the Supreme Court including the lower courts, the news media including radio, television, newspapers, and magazines, and the general public including those who make the news as well as those who read the news.

The system itself is an open one, with observable influence occurring between the three subsystems. However, the individual subsystems are closed, the influence of external as well as internal factors observable only as they affect the output of the particular subsystem, not its internal processes.[18]

The information system, as well as other systems, consists of four things.[19] First, it has objects. These are the parts, elements, or members of the set, in this case the three subsystems mentioned earlier. Second, it has attributes. These are the qualities and properties of the system and its objects. In this case, these are an aggressive news media, an increasingly unsympathetic Court, and a wary public. Third, it has internal relationships among its objects or subsystems. This characteristic is a crucial defining quality of systems. It implies interdependence and constraint.(The public depends on the media for news and publicity but constrains the media through public opinion. The Court depends on the news media to challenge inadequate laws but constrains the media through its improvements on those laws. The public depends on the Court for its philosophy of government but constrains the Court through the opinions they already hold as a result of various external factors, including previous Court decisions.)[20] Fourth, it has an environment. The information system does not exist in a vacuum but is affected

by its surroundings. According to the Court, this environment is one of "a profound national commitment to the principle that debate on public issues should be "uninhibited, robust, and wide-open."[21]

Cybernetics examines feedback and how it helps to control and regulate systems, in this case, the information system. A part of the output from the system is returned as feedback and certain internal controls or adjustments take place. There are two types of feedback: positive and negative. Positive feedback tells the system to continue or increase its present behavior. Negative feedback tells the system to alter or decrease its present behavior.[22]

However, a complex system (such as the information system) does not necessarily respond as a unit to feedback: its subsystems are part of the larger system as well as part of the environment. These subsystems respond to each other in mutual interdependence, this is known as a feedback loop.[23]

When one subsystem gives positive feedback to a second subsystem (thus telling it to continue or increase its present behavior) and this second subsystem gives positive feedback to a third subsystem (which completes the cycle by returning positive feedback to the first subsystem), the system is said to be in a positive feedback loop.

Similarly, when one subsystem gives negative feedback to a second subsystem (thus telling it to alter or decrease its present behavior) and this second subsystem gives negative feedback to a third subsystem (which completes the cycle by returning negative feedback to the first subsystem), the system is said to be in a negative feedback loop.[24]

These positive and negative feedback loops follow each other in a cycle, compensating for the effects of each other and thus returning the system to a condition of equilibrium.[25] The identification of the point at which a system exists in this cycle would help predict its future behavior. Therefore, this theory could be useful in predicting the direction of the Court regarding future libel decisions.

Now to examine the "New York Times family" of libel decisions,to determine whether there was a "chilling effect" on the news media. This examination will provide a basis for predicting the direction of Supreme Court libel decisions.

The first 13 decisions of the Court (New York Times v. Sullivan through Rosenbloom v. Metromedia 1964-1971 See Appendix A, numbers 1-13), with the exception of the Rosenbloom decision, all occurred under the liberal-activist Warren Court, headed by Chief Justice Earl Warren. (For a complete summary of the Court's composition over the past 22 years including the Justices, the years they served, when they were appointed and by whom, see Appendix D.) The first of these decisions, New York Times v. Sullivan, greatly favored the media's position of wanting greater freedom of the press. The press certainly thought so, as evidenced by this excerpt from a National Review editorial written shortly after the decision was handed down:[26]

> "Although one may never be quite sure what will prove to be the future meaning and application of a particular decision, we rather like, at least on first reading, a good deal of the doctrine with which Justice Brennan, for the majority, motivated the Court's unanimous decree."

This excerpt from an editorial appearing in The New York Times the day after the decision was handed down expressed similar approval:[27]

> "In its landmark decision yesterday, the Supreme Court of the United States has struck a solid blow not only for the freedom of the press but for the perogatives of a free people."

These excerpts reflect the warmth of the reception that the media gave the Sullivan decision. Other related Court decisions in this period (1964-1971) also favored the news media's position of wanting greater freedom of the press and thus received similarly favorable comment from the news media. Journalists, broadcasters, lawyers and scholars agreed that the scope of the First Amendment's free press clause had been widened, for the better, and that freedom of the press had been protected.

This positive feedback from the news media encouraged the Court to extend the libel protection further. This in turn encouraged the public to expand their conception of freedom of the press. This expanded view of press freedom further encouraged the news media to be aggressive, which encouraged a Court interested at that time in an aggressive and free press. Thus, the information system was stuck in a positive feedback loop. When the dust finally settled, "the New York Times rule" had been extended from "public officials" to "public figures" and finally even to "private individuals involved in a matter of public concern."[28]

Theoretically then, a corrective negative feedback loop was just around the corner.

There were some other reasons to suspect this change as well. There was growing public concern at the time of Nixon's first term (1969-1972) with the rising crime rate.[29] The public felt the courts, including the Supreme Court, were being "too soft on criminals." Decisions such as Mallory, Miranda, and Escobedo were restricting the police's efforts to deal with criminals, the public felt.[30]

President Nixon took full advantage of this growing public discontent with the Court. After his election in 1968, he made the following statement regarding the Supreme Court:[31]

> "We need more strict constructionists on the highest court of the United States. In my view, the duty of a Justice of the Supreme Court is to interpret the law, not to make the law, and the men I appoint shall share that view."

Nixon eventually was to appoint four Justices to the Court, including Chief Justice Warren Burger in 1969. (For a complete summary of the Court's composition over the past 22 years including the Justices, the years they served, when they were appointed and by whom, see Appendix D). Thus, the liberal-activist Warren Court was slowly becoming the conservative-constructionist Nixon or Burger Court.

These factors appear to have had a significant effect on the Court's next five libel decisions (Gertz v. Robert Welch, Inc. through Wolston v. Reader's Digest, 1974-1979 See Appendix A, numbers 14-18). These five decisions, which were largely unfavorable to the news media, represent the expected negative feedback loop.

The Gertz decision is the pivotal one. It was either the end of the positive feedback loop or the beginning of the negative feedback loop, depending upon one's point of view. In the Gertz decision, the Court ruled the following:[33]

> "Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public-figure question should be determined by reference to the individual's participation in the particular controversy giving rise to the defamation."

The decision outlawed punitive damages in all libel suits brought by private individuals unless "actual malice" is proved. It also limited compensatory damages to "actual injury based on competent evidence."[34]

During the years following the Gertz decision, much popular and scholarly speculation arose as to whether the Court was retreating from at least the spirit, if not the letter, of the Sullivan decision. Indeed, a 1976 study found that in the decade between Sullivan and Gertz (1964-1973) the Supreme Court seldom ruled against a media defendant in a libel case, but in the years following it had almost never ruled for one.[35]

Clifton O. Lawhorne, in his book The Supreme Court and Libel observed the following:[36]

> "This (the Gertz decision) was followed by the decisions that followed in the lower courts, by the increase in the number of libel suits that were filed, and by the jump in insurance policies purchased by newspapers and broadcasting companies."

However, some took the position that the Gertz decision, at least, was a victory for the press and not a defeat. One researcher reasoned his conclusion in the following way:[37]

> "It may be perceived as a retreat from the position taken by the plurality in Rosenbloom in 1971[38] that a private libel plaintiff involved in a matter of public interest (either voluntarily or involuntarily) must prove `actual malice.' To the extent that the Gertz opinion reversed Rosenbloom, the opinion is a retreat. But Gertz may also be viewed as a positive step in bolstering First Amendment principles since the opinion also ruled out the common law concept of strict liability in tortious conduct."[39]

Another study even went so far as to say that the Gertz decision can "certainly be interpreted as epousing the Times rule as a special defense for media defendants."[40]

The cybernetics perspective tells one to expect a negative feedback loop in this situation: following a period of continued positive feedback. This in fact occurred in the 1973-1979 period, correcting for the positive feedback loop of decisions favorable to the news media in the 1964-1971 period.

In this period, the Court refused to extend the "New York Times rule" to reports of judicial proceedings, private individuals who receive funding from the government for their work, and private individuals involuntarily involved in matters of public concern.[41]

This negative feedback loop is epitomized by the 1979 Herbert v. Lando[42] decision. This decision said that plaintiffs can compel defendants in libel suits to reveal thier thoughts, editorial decisions, and newsroom discussions involved in the preparation of news stories.[43] So while the Gertz[44]

decision could possibly be viewed as a victory for the press (for the reasons mentioned above), Herbert v. Lando must certainly be viewed as a defeat, because it has the potential to cause a restriction of the freedom of the press.

Press reaction was strongly against the decision. This can be seen in the following excerpt from a Los Angeles Times editorial, which appeareed shortly after the decision was handed down in April of 1979, entitled "Blood on the First Amendment:"[45]

> "Not only will this decision have a `chilling effect' on the material that editors and reporters prepare for publication, it will also intrude deeply into the internal process behind publication by opening to discovery ideas expressed within news organizations in conversations and memoranda."

But did the Herbert v. Lando decision and others in the negative feedback loop period (1973-1979) actually have this "chilling effect" on the news media (as cybernetics says it should), contrary to the intent of the original New York Times v. Sullivan decision?

In 1981, Douglas A. Anderson and Marianne Murdock[46] published a study entitled "Effects of Communication Law Decisions on Daily Newspaper Editors."[47] A total of of 103 (out of 150) of their questionnaires were answered by newspaper managing editors (or editors, at the smaller papers). Eighty-two percent of the respondents disagreed or strongly disagreed that the Herbert v. Lando ruling had made them "less aggressive" when decidingg whether to print a potentially libelous statement.[48] This is contrary to the predictions which followed the decision in 1979 as well as to the cybernetic model. However, seventy-four percent agreed they are "increasingly careful" when editing these stories.[49]

The increased threat of lawsuits and large damage awards has caused newspapers to become more reliant on attorneys for advice. Ninety-three percent percent of all editors said they check potentially libelous passages with an attorney. (All of the newspapers in the survey with circulation above 50,000 retain attorneys.)[50] Sixty percent of the editors in the survey agreed that they checked potentially libelous statements with their publishers.[51]

Clearly, reporters and editors are making sure to double-check stories and hopefully avoid costly litigation. But they have not been as successful as they might have hoped. Sixty-eight percent of the editors responding said their newspaper had been sued during the past five years (eighty-five percent for libel, twelve percent for invasion of privacy).[52] But the damage awards have not been as large as some of the recent highly publicized cases. Of those newspapers that had been sued, only six had paid court ordered damages, one of more than $100,000. Twenty-five percent percent of the editors said their newspapers settled out of court.[53]

Along with increased reliance on attorneys, newspapers also have become increasingly reliant on costly insurance. Seventy-five percent of the editors said their newspaper8s carried libel insurance. Fifty-seven percent of those newspapers refused to reveal the amount of their coverage, but twenty-eight percent said ti was more than one million.[54]

Based on Court decisions during the past five years, seventy-seven percent of the editors responding agreed or strongly agreed that the Burger Court is basically "anti-media;" thirteen percent said they did not know; eleven percent

disagreed. This is quite a change from the days of the Warren Court and its declaration of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[56] However, this change is merely the negative feedback loop compensating for the positive one. Whether this is having a "chilling effect" on the news media requires further investigation.

The study concluded with the following:[57]

"Not suprisingly, the vast majority of editors said the Burger Court had eroded press protection....Still, whether the editors are less aggressive or not when making publication decisions, nearly three-fourths indicated they are "increasingly careful" when editing. Press crittics, of course, would contend that this is as it should be.

"...More than two-thirds of the editors said their newspapers had been involved in litigation during the past five years--mostly defending against libel actions."

So this study suggests a pattern of increased caution and responsibility in response to the negative feedback loop of Court decisions. But it does not appear that this increased caution has reached the point yet where it would constitute a "chilling effect." Now to examine some further evidence.

In 1983, Ben Silver and James Bow[58] published a study entitled "Effects of Herbert v. Lando on the News Process."[59] As total of 312 (out of 639) of their questionnaires were answered by newspaper managing editors (or editors,

at the smaller papers) and television news directors directors. Fifty-seven percent of the respondents said the decsion had a "considerable effect" on news editing and reporting.[60] This is to be expected as a direct result of the negative feedback loop of Court deciions unfavorable to the news media.

But suprisingly they also reported virtually no increase in the number of lawsuits filed due to the decision.[61] This is not what one would expect given the negative feedback loop; as the chance for obtaining a favorable verdict increases, defendants would be expected to increase the amount of their litigation accordingly.

Legal journalistic guidelines issued as a result of the decision include such advice as having less newsroom discussion, being sure to double-check stories and exercising general caution.[62] These may impose certain hardships upon the news media, but they certainly do not constitiute a "chilling effect." However, the potential certainly is there for these "guidelines" to become virtual handcuffs in the future. Evidence of this would be either an increase in lawsuits against the news media (which has not occurred) or a reduction in the amount or thoroughness of editorializing or investigative reporting (which has not occurred, yet).

Newspapers and television stations adopted some or all of these suggestions, depending upon their perception of the effect of the decision. The study said twenty-four percent of those saying the decision had some effect reported they used increased caution in getting stories. Twelve percent said there was more caution in editing. Twelve percwent said there was increased caution in talking as a result of the decision.[63]

The study concluded with the following:

> "While the "chilling effect" of Herbert v. Lando on the editorial process appeared slight, concern in varying degrees was expressed by a substanial majority of news directors. This was illustrated by the majority (80 percent) disagreeing with the decision itself.
>
> "It would be foolish to dismiss the long-range effects of Herbert v. Lando simply because immediate effects did not prove to be as devastating as some critics originally predicted."

So these studies indicate that the negative feedback loop, of Court decisions unfavorable to the news media in the 1973-1979 period, did make the new media somewhat more cautious but did not produce a "chilling effect." However, the possibility was left open of a "chilling effect" occurring in the future. This "chilling effect" shoulfd occur as the negative feedback loop of Court decisions unfavorable to the news media increases. This increasing negative feedback loop is to be expected according to the cybernetics model, even to the point of possibly repealing the New York Times v. Sullivan decision and thus completing the negative feedback loop. If this scenario occurs it would complete the cycle begun by the New York Times v. Sullivan decision and thus return the information system to a state of equilibrium. However, this would presumably produce a "chilling effect," since the law of libel would return to the state of "strict liability" in which it existed prior to the New York Times v. Sullivan decision.[65] Therefore, some further investigation is necessary to determine if this will indeed occur (since it does not appear to be occurring at the present time).

Steve Pasternack[66] published a study, also in 1983, entitled "Editors and the Risk of Libel in Letters.[67] The content and focus of this study was different from the two previous ones, however, in that it did not focus on a particular case or even any actual cases. Rather, it attempted to discover what effect the potential of a libel suit had on a newspaper's Letter To The Editor policies and practices.[68]

No letters cases have actually made it to the Supreme Court but there have been many in the lower courts. Because these cases still have an effect on the news media, they are there fore sufficient for the purpose of determining whether the increasing negative feedback loop will result in a "chilling effect." This study deals with effects of a potential libel suit rather than an actual decision, therefore it is better for the judging the presumed negative long-range effects on the freedom of the press of which the two previous studies warn and the cybernetics model says to predict. These future cases, beyond those presently in the "New York Times family," are what the cybernetics model dictates the news media should be most concerned about; they are closewr to completing the cybernetic cycle begun in 1964 and thus, causing a "chilling effect" on the news media.

A total of 72 questionnaires (out of 121) were answered by editorial page editors (or editors, at the smaller papers) of newspapers with an average daily circulation of 25,000 or more. Newspapers in the sample averaged 221 letters per month. The mode for the number of letters received was 150. Seventy-five percent of the letters received by the sample newspapers were published.[69]

When describing the facts of a libel case, Letters To The Editor are considered in a court of law to be no different than any other published material. They do not enjoy a special status when they become the subject of libel suits.[70] Therefore, the concern about a potential libel suit should be virtually the same as with anarticle or editorial. This makes it sufficient for the purpose of seeing whether or not freedom of the press will be restricted by the continuation of the negative feedback loop of which the two previous studies warn and the cybernetics model says to predict.

Eighty-eight percent of the sample newspapers had not been sued due to a Letter To The Editor in the last decade. Seventy-five percent of the respondents said it is likely that a potentially libelous letter will be automatically rejected. Sixty-nine percent said they generally allow harsher language to appear in letters than elsewhere in the newspaper. Eighty-seven percent said they verify Letters To The Editor.[71] (These and various other practices are adopted by newspapers to guard against potentially libelous letters.[72] For a complete list of these practices and the percentage of the newspapers in the sample that engaged in each particular practice, see Appendix C.) Newspapers which allow harsher language in Letters To The Editor and those that do not both perceive about the same risk of libel.[73]

The study concluded with the following:[74]

"Newspaper editors are genrally aware of the dangers that inhabit the open forum. Most appear determined to minimize those risks through a variety of practices ranging from verification of author to checking the letter's facts to consulting an attorney. Rather than simply discard a letter,

newspapers seem willing to authenticate, rehabilitate, and publish it where the situation allows."

The evidence presented in these studies does not indicate the presence of a "chilling effect" on the news media, despite the negative feedback loop of Court decisions unfavorable to the news media in the 1973-1979 period. However, the continuation of this negative feedback loop will almost certainly result in a "chilling effect" in the future, the studies warn.

Yes, newspaper editors were "increasingly careful" as a result of the Herbert v. Lando and other decisions. There also was an increasing number of lawsuits based upon Letters To The Editor (although not overall lawsuits against the news media), which often made editors think twice and double check letters to guard against a potential libel suit. However at the present time, the negative feedback loop has not compensated fully for the effects of the positive feedback loop by negating the freedom that it originally produced. If this complete negation of the positive feedback loop of the 1964-1971 period occurs, as cybernetics says it will, it certainly would produce a "chilling effect." This is because libel law would be returned to the pre-Sullivan concept of "strict liability."

The positive feedback loop of Court decisions favorable to the news media in the 1964-1971 period did increase freedom of the press and encouraged aggressive reporting. This was the intent of the original 1964 decision. However, while a negative feedback loop of decisions unfavorable to the news media did occur in the 1973-1979 period, it did not result in a fully compensatory restriction of aggressive reporting and freedom of the press, or a "chilling effect."

According to the cybernetics model, this is necessary to complete the cycle and return the information system to a state of equilibrium. So while the "chilling effect" has not occurred yet, it is certain to do so in the future.[75]

Therefore, as viewed from the cybernetics perspective, the progeny of New York Times v. Sullivan (1964-1979) did not have a "chilling effect" on the news media. It merely made editors and reporters "increasingly careful." Thisa should have the desirable result of making the news media more responsible, thus increasing its credibility among the general public and through them, the judiciary. But whether this will indeed happen remains to be seen.

However, the situation will get worse before it gets better. Faced with an increasingly hostile judiciary (including the Supreme Court) and an unsympathetic public,[76] this responsibility" will soon become timidity and a lack of skepticism among members of the new media. When this scenario is achieved (more plausible now under President Reagan and soon-to-be Chief Justice William Rehnquist than at any time in recent history) a "chilling effect" on the new media will be present and the cybernetic cycle will be complete.

FOOTNOTES

1 (376 US 254)

2 "Heed Their Rising Voices" (Full Page Advertisment) The New York Times, March 29, 1960 Section 1 page 25 paragraphs 3 and 6 respectively. For full text of advertisement, including aforementioned paragraphs, see Appendix B.

3 "Libel Landmark" Newsweek March 23, 1964 page 74 columns 1 and 2

4 The students sang the National Anthem, not 'My Country Tis Of Thee.' Several students were expelled from the school for demanding service at an all-white lunch counter, but not for leading the demonstrations at the Capitol. Police were deployed near the campus but they did not 'ring' it. Students protested the explusions by boycotting classes for a day, not by refusing to re-register. The campus dining hall was never padlocked; the only students denied access to it were those who did not have meal tickets. King had been arrested four times, not seven times. ("Subsequent Punishment: Libel," Congressional Quarterly's Guide to the U.S. Supreme Court Washington, D.C. 1979 Congressional Quarterly, Inc. page 434 column 1)

5 "Libel Landmark" page 74 column 2

6 (376 US 254)(1964)

7 (376 US 254)(1964)

8 "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedonm of speech, or of the press; or of the people to peaceably assemble, and to petition the government for a redress of grievances." (The Constitution of the United States of America Amendement 1)

9 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (The Constitution of the United States of America Amendment 14, Section 1, paragraph 1.)

10 (376 US at 270) (1964)

11 "The United States Supreme Court on Libel" by W.C. Minnick Quarterly Journal of Speech Volume 68 no. 4, November 1982 page 386 column 2

12 "Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants" 95 Harvard Law Review 1885 June 1982 note 67 and See Appendix A

13 Pember, Don R., Mass Media Law (Dubuque, Iowa: Wm. C. Brown Publishers, 1984) pages 123-124

14 Minnick, page 392 column 1

15 This is defined as "a significant reduction, in measures over time, and in light of influence by an outside factor, of the vigorousness of journalistic coverage of public issues. Through use the term has come to refer to a result that is barely perceptible-if not imperceptible-and that is derived from factors not primarily concerned with the quality of journalism content. (Lashner, Marilyn A. The Chilling Effect in TV News: Intimidation by the Nixon White House New York: Praeger Publishers, 1984 page 1)

16 Stephen W. Littlejohn, Theories of Human Communication (Belmont, California: Wadsworth Publishing Company; A Division of Wadsworth, Inc., 1983) page 33, column 1

17 Littlejohn, page 29 coumn 1

18 However, for a rare glimpse inside one subsystem, the Supreme Court, see The Brethren by Bob Woodward and Carl Armstrong (New York: Avon Books; A Division of the Hearst Corporation, 1979)

19 Littlejohn, pages 29-30 columns 2 and 1

20 Littlejohn, page 275

21 (376 US at 270)

22 Littlejohn, pages 34-35

23 Littlejohn, page 35

24 Littlejohn, page 36 Figure 3.5

25 Littlejohn, page 36 column 2

26 "Speak Up Everybody" (Editorial) National Review March 24, 1964 page 222 column 1

27 "Free Press and Free People" (Editorial) The New York Times March 10, 1964 page 36 column 1

28 See Appendix A. For a more complete examination of the expansion of the "New York Times rule" in the state and federal courts during the 1960's, see Defamation and Public Officials by Clifton O. Lawhorne, Chapter 13 "State

Conformity" (Carbondale and Edwardsville: Southern Illinois University Press, 1971)

29 Crime had increased 88 percent and during the same period, the population only had increased 10 percent. ("Three Candidates Speak Out On Three Big Issues" TABLE U.S. News and World Report May 20, 1968 Volume 64 No. 21 page 50)

30 Gallup polls in 1968 (the year Nixon was elected) and 1974 (the year the Gertz decision was handed down) both mentioned crime as being one of the most important problems in this country, but in 1964 (the year of the Sullivan decision) no mention was made of this problem. (Gallup, Dr. Geoerge P., The Gallup Poll: Public Opinion 1935-1971 Volume Three AND 1972-1977 Volume One Wilmington, Delaware: Scholarly Resources Inc., 1978) The three Supreme Court cases were specifically mentioned by a United States Senator in a speech on this problem ("A Senator Tells; What the Courts Are Doing To Law Enforcement" U.S. News and World Report May 20, 1968 page 51 column 2)

31 "Changes Nixon May Make In Federal Courts" U.S. News and World Report December 2, 1968 Volume 65 No. 23 page 42 column 1

32 (418 US 323) (1974)

33 (418 US at 351-352) (1974)

34 See Appendix A, number 14

35 "Effects of Gertz Decision in One Federal Circuit" by Phyllis Ann Avery and John D. Stevens Journalism Quarterly volume 53 No.4 Winter 1976 page 897 column 2

36 Clifton O. Lawhorne, The Supreme Court and Libel (Carbondale and Edwardsville Illinois: Southern Illinois University Press, 1981) page 106

37 "The Impact of Gertz on the Law of Libel" by Harry W, Stonecipher and Robert Trager Journalism Quarterly Volume 53 No.4 Winter 1976 page 10 column 1

38 (403 US 29) (1971)

39 Strict liability" refers to the situation where libel is considered to be present merely if identification, publication, and defamation occur; there is no fault requirement necessary to be proved by the plaintiff.

40 The reason for this assertion is that the requirement for the plaintiff in a libel suit to prove 'actual malice' applies only to lawsuits against the media, not lawsuits against private individuals. ("Is 'Actual Malice' Rule a Special Privilege for the Press?" by Harry W. Stonecipher

Newspaper Research Journal Volume 2 No. 3 April 1981, page 40 column 1)

41 See Appendix A, numbers 14-18

42 (441 US 153) (1979)

43 See Appendix A, number 16

44 (418 US 323) (1974)

45 "Blood on the First Amendment" (Editorial) The Los Angeles Times April 19, 1979 Part II page 6 column 1

46 Dr. Anderson teaches at Arizona State University. Dr. Murdock teaches at the University of Virginia.

47 "Effects of Communication Law Decisions on Daily Newspaper Editors" by Douglas A. Anderson and Marianne Murdock Journalism Quarterly Volume 58 No.4 Winter 1981 pages 525-528

48 Anderson and Murdock, page 527 column 1

49 Anderson and Murdock, page 527 column 1

50 Anderson and Murdock, page 527 column 2

51 Anderson and Murdock, page 527 column 1

52 Anderson and Murdock, page 528 column 1

53 Anderson and Murdock, page 528 column 1

54 Anderson and Murdock, page 528 column 1

55 Anderson and Murdock, page 528 column 2

56 (376 US at 270) (1964)

57 Anderson and Murdock, page 528 column 2 and page 534 column 2

58 Dr. Silver is Assitant Professor, Department of Journalism and Telecommunication, Arizona State University and Dr. Bow is Assistant Professor, School of Journalism and Mass Communication, University of Iowa (later at Kent State University)

59 "Effects of Herbert v. Lando on the News Process" by Ben Silver and James Bow Journalism Quarterly Volume 60 No. 1 Spring 1983 pages 115-118

60 Silver and Bow, page 115 column 2 and page 116 Table 1

61 Silver and Bow, page 117 Table 2

62 Silver and Bow, page 118 column 1

63 Silver and Bow, page 117 column 2

64 Silver and Bow, page 118 column 2

65 "Strict liability" refers to the situation where the plaintiff only must prove publication, identification and defamation. There is no fault requirement required to be proved by the plaintiff. This situation may soon occur, for a further discussion of this possibility, see the Epilogue.

66 Assistant Professor of Journalism at New Mexico State University

67 "Editors and the Risk of Libel in Letters" by Steve Pasternack Journalism Quarterly Volume 60 No. 2 Summer 1983 pages 311-315

68 Pasternack, pages 313-314 columns 2 and 1

69 Pasternack, page 314

70 Pasternack page 311 note 7. This subject was dealt with by the Oklahoma Supreme Court in 1977: "We are not directed to any authority which indicates that a newspaper's duty is any different with regard to a Letter To The Editor from a third person than is the duty owing from an article written by its staff." (Pasternack, page 311 column 2 and Weaver v. Pryor Jeffersonian 569 P. 2d 967 (1977)

71 Pasternack, page 314 column 2

72 Pasternack, page 314 column 2

73 Pasternack, page 315 column 2. Many newspapers allow harsher language in letters than elsewhere in the newspaper. Possibly as a result, libel suits resulting from Letters To The Editor have been on the rise. Between 1977 and 1981, fifteen libel suits based on Letters To The Editor were reported, compared to only eight for the previous decade. (Pasternack, page 311 note 2)

74 Pasternack, page 315 column 2

75 See Epilogue

76 Lyle Denniston, veteran Supreme Court reporter, asserted that the Burger Court "has no consistent view of press freedom" and that "not a single justice is dependably available to argue to argue within the Court for a simple , firm defense of the First Amendment." Denniston said "a

testy mood is emerging in regard to the press' role in society, a mood that nurtures supicions on the Court about the constitutional claims of the press." Jonathan Kwitny, in a Wall Street Journal article, said that the judiciary "has for all practical purposes declared war against the press." (Anderson and Murdock, page 526 column 1 AND Lyle Denniston, "Without a Champion," The Quill September 1978 page 23; Jonathan Kwitny, "A Judicial War on the Press" Wall Street Journal August 23, 1978 page 12)

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APPENDIX A

The New York Times v. Sullivan decision and its progeny
The "New York Times family" of libel cases
A History of the evolution of libel law

1. New York Times v. Sullivan (376 US 254) (1964) A "public official" cannot be defamed by a defamatory falsehood relating to his official conduct unless he proves "actual malice."

2. Garrison v. Lousiana (379 US 64) (1964) Misstatements arising out of "hatred, anger, or ill will" do not constitute "actual malice" when discussing the fitness of a candidate for public office. This applies to criminal as well as civil cases.

3. Henry v. Collins (380 US 356) (1965) Critics of public officials have a fair equivalent of the immunity from libel that is granted to the public officials themselves. "The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place." (The Constitution of the United States of America, Article 1, Section 6, paragraph 1)

4. Ashton v. Kentucky (384 US 195) (1965) Where the accused is convicted under a broad construction of a law which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the law. Because the offenae was defined at a trial as the publication of a writing calculated to disturb the peace, defendant was judged by an unconstitutionally vague standard which required calculations as to the reaction of the audience to which the publication was addressed. Although vague laws in any setting are impermissable, laws which touch on First Amendment rights must be carefully and narrowly drawn.

5. Rosenblatt v. Baer (383 US 75) (1966) Governmental employees believed by the public to have substanial responsiblity for governmental affairs must prove "actual malice" concerning defamatory falsehoods related to their offical conduct.

6/7 Curtis Publishing Co. v. Butts (388 US 130) AND Associated Press v. Walker (388 US 130) (1967) A "public figure" cannot be libeled by defamatory falsehoods related to the public controversy in which he is involved, if he injected himself into the forefront of the controversy in an attempt to

influence the resolution of the issue, without proving 'actual malice,' unless he can prove highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting normally adherred to by a responsible publisher.

8. Beckley Newspaper Corporation v. Hanks (381 US 81) (1967) Failure of a publisher to make prior investigation of alleged facts which the publisher supposed to be true, but which were actually false, is not sufficient to establish "actual malice."

9. St. Amant v. Thompson (390 US 727) (1968) There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication. Publication with such doubt shows reckless disregard for truth or falsity and demonstrates "actual malice."

10. Time, Inc. v. Hill (385 US 374) (1967) The innocent publication of erroneous or merely negligent statements about a matter of public interest must be protected if freedoms of expression are to have the 'breathing space' needed to survive. However, this freedom does not extend to "calculated falsehoods."

11. Monitor Patriot Company v. Roy (401 US 265) (1971) A charge of criminal conduct against a public official or candidate for public office, no matter how remote in time or place, is always "relevant to his fitness for public office." Publication of such charges is therefore protected by the "actual malice rule."

12. Oscala Star Banner Company v. Damron (401 US 295) (1971) A charge of criminal conduct against a public official or candidate for public office, no matter how remote in time or place, is always "relevant to his fitness for public office," and therefore protected by the "actual malice rule."

13. Rosenbloom v. Metromedia, Inc. (403 US 29) (1971) Private individuals involved, even involuntarily, in matters of "public interest" must prove "actual malice" concerning falsehoods related to the matter of interest in which they are involved.

14. Gertz v. Robert Welch, Inc. (418 US 323) (1974) Private individuals involuntarily involved in matters of "public interest" do not have to prove "actual malice" concerning falsehoods that lead to impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Compensatory damages in all suits brought by private individuals are limited to actual injury based on competent evidence. No punitive damages will be allowed unless "actual malice" is proved.

15. Time, Inc. v. Firestone (424 US 448) (1976) The defendant did not occupy a role of especial prominence in the affairs of society, nor did she voluntarily thrust herself to the forefront of a public controversy in an attempt to influence the resolution of the issue. Therefore, the defendant is not a "public figure" and the "actual malice rule" does not apply. The rule does not automatically extend to all reports of judicial proceedings, because those involuntarily drawn into a courtroom have not voluntarily exposed themselves to increased risk of injury from defamatory falsehood.

16. Herbert v. Lando (441 US 153) (1979) Plaintiffs can compel defendants in libel suits to reveal their thoughts, editorial decisions, and newsroom discussions involved in the preparation of news stories.

17. Hutchinson v. Proxmire (443 US 111) (1979) Press releases and newsletters are not "essential to the deliberations of the Senate" and therefore are not protected by the Speech and Debate Clause. The plaintiff was not a "public figure," and thus not subject to the "actual malice rule." This is in spite of the news reports concerning the defendant's research (for which he had received public funding) and his winning of the Golden Fleece Award (because he did not have previous access to the media before these events). The defendant could not make the plaintiff a "public figure" by their own conduct, in order to create a defense.

18. Wolston v. Reader's Digest (443 US 157) (1979) A person who engages in criminal conduct does not automatically become a "public figure" for purposes of comment on a limited range of issues relating to his conviction.

Heed Their Rising Voices

Let Congress heed their rising voices, for they will be heard."

New York Times editorial
Saturday, March 19, 1960

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upwelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it was this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead the alternative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of liberty these Southern students are defending, is our America as well as theirs. . . .

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious reaffirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

Stella Adler
Raymond Pace Alexander
Harry Van Arsdale
Harry Belafonte
John Beradino
Dr. Algernon Black
Mary Bracken
William Branch
Marlon Brando
Mrs. Ralph Bunche
Diahann Carroll

Dr. Alan Knight Chalmers
Richard Coe
Nat King Cole
Cheryl Crawford
Dorothy Dandridge
Ossie Davis
Sammy Davis, Jr.
Ruby Dee
Dr. Philip M. Ewell
Dr. Harry Emerson Fosdick

Anthony Franciosa
Lorraine Hansberry
Rev. Donald Harrington
Pat Hingle
James Hicks
Mary Hinkson
Van Heflin
Langston Hughes
Morris Iushewitz
Mahalia Jackson
Madalyn Johnson

John Kenyon
Earle Kim
Rabbi Edward Klein
Hope Lange
John Lewis
Viveca Lindfors
Carl Murphy
Dan Mahony
John Murray
A. J. Muste
Frederick O'Neal

L. Joseph Overton
Clarence Pickett
Shad Polier
Sidney Poitier
A. Philip Randolph
John Rarick
Elmer Rice
Jackie Robinson
Mrs. Eleanor Roosevelt
Bayard Rustin
Robert Ryan

Maureen Stapleton
Frank Silvera
Hope Stevens
George Tabor
Rev. Gardner C. Taylor
Norman Thomas
Kenneth Tynan
Charles White
Shelley Winters
Max Youngstein

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Rev. Ralph D. Abernathy (Montgomery, Ala.)
Rev. Fred L. Shuttlesworth (Birmingham, Ala.)
Rev. Kelley Miller Smith (Nashville, Tenn.)
Rev. W. A. Dunn (Chattanooga, Tenn.)
Rev. C. K. Steele (Tallahassee, Fla.)

Rev. Matthew D. McCollom (Orangeburg, S. C.)
Rev. Wilbur Haines Borders (Atlanta, Ga.)
Rev. Douglas Moore (Durham, N. C.)
Rev. Wyatt Tee Walker (Petersburg, Va.)

Rev. Walter L. Hamilton (Norfolk, Va.)
I. S. Levy (Columbia, S. C.)
Rev. Martin Luther King, Sr. (Atlanta, Ga.)
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Mrs. Katie E. Whatley (New Orleans, La.)
Rev. W. H. Hall (Harrisburg, Miss.)
Rev. J. E. Lowery (Mobile, Ala.)
Rev. T. J. Jemison (Baton Rouge, La.)

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312 West 125th Street, New York 27, N. Y. UNiversity 6-1700

Chairmen: A. Philip Randolph, Dr. Gardner C. Taylor; Chairman of Cultural Division: Harry Belafonte; Sidney Poitier; Treasurer: Nat King Cole; Executive Director: Bayard Rustin; Chairman of Church Division: Father George B. Ford, Rev. Harry Emerson Fosdick, Rev. Thomas Kilgore, Jr., Rabbi Edward E. Klein; Chairman of Labor Division: Morris Iushewitz

Please mail this coupon TODAY!

Committee To Defend Martin Luther King and The Struggle For Freedom In The South
312 West 125th Street, New York 27, N. Y.
UNiversity 6-1700

I am enclosing my contribution of $_____ for the work of the Committee.

Name _____ Please print.

Address _____

City _____ Zone _____ State _____

☐ I want to help ☐ Please send me more information

Please make checks payable to:
Committee To Defend Martin Luther King

Fig. 4-1 This is the controversial advertisement that led to the landmark New York Times v. Sullivan Supreme Court decision.

Appendix B

BEST COPY AVAILABLE

APPENDIX C

Various practices are adopted by newspapers to guard against potentially libelous letters. The following is a list of those practices and the percentage of the newspapers in the sample that engaged in each particular practice:

Automatic rejection.....75 percent

Edit libel.....91 percent

Contact writer.....68 percent

Consult attorney.....24 percent

Staff check facts.....68 percent

Contact person charged.....35 percent

Attach Editor's Note.....10 percent

Publish letter as is.....4 percent

(Source: "Editors and the Risk of Libel in Letters" by Steve Pasternack Journalism Quarterly Volume 60 No.2 Summer 1983 pages 311-315)

Appendix D

The Justices of the United States Supreme Court 1964-1986

Hugo Black 1937-1971 (Roosevelt)

William Douglas 1939-1975 (Roosevelt)

Tom Clark 1949-1967 (Truman)

Earl Warren 1953-1969 (Eisenhower)

John Harlan 1955-1971 (Eisenhower)

William Brennan 1956-Present (Eisenhower)

Potter Stewart 1958-1981 (Eisenhower)

Byron White 1962-Present (Kennedy)

Arthur Goldberg 1962-1965 (Kennedy)

Abe Fortas 1965-1969 (Johnson)

Thurgood Marshall 1967-Present (Johnson)

Warren Burger 1969-Present (Nixon)

Harry Blackmun 1970-Present (Nixon)

William Rehnquist 1972-Present (Nixon)

Lewis Powell 1972-Present (Nixon)

John Paul Stevens 1975-Present (Ford)

Sandra Day O'Connor 1981-Present (Reagan)

The Warren Court 1964

Earl Warren (Chief Justice)
Hugo Black
William Douglas
William Brennan
Potter Stewart
John Harlan
Byron White
Arthur Goldberg
Tom Clark

The Warren Court 1965-66

Earl Warren (Chief Justice)
Hugo Black
William Douglas
William Brennan
Potter Stewart
John Harlan
Byron White
Tom Clark
Abe Fortas

The Warren Court 1967-68

Earl Warren (Chief Justice)
Hugo Black
William Douglas
William Brennan
Potter Stewart
John Harlan
Byron White
Abe Fortas
Thurgood Marshall

The Burger Court 1969-1971

Warren Burger (Chief Justice)
Hugo Black
William Douglas
William Brennan
Potter Stewart
John Harlan
Byron White
Thurgood Marshall
Harry Blackmun

The Burger Court 1971-1975

Warren Burger (Chief Justice)
William Douglas
William Brennan
Potter Stewart
Byron White
Thurgood Marshall
Harrry Blackmun
Lewis Powell
William Rehnquist

The Burger Court 1975-1981

Warren Burger (Chief Justice)
William Brennan
Potter Stewart
Byron White
Thurgood Marshall
Harry Blackmun
Lewis Powell
William Rehnquist
John Paul Stevens

The Burger Court 1981-Present

Warren Burger (Chief Justice)
William Brennan
Byron White
Thurgood Marshall
Harry Blackmun
Lewis Powell
William Rehnquist
John Paul Stevens
Sandra Day O'Connor

(Source: Leon Friedman and Fred L. Israel, Editors The Justices of the United States Supreme Court 1789-1969 Their Lives and Major Opinions Volumes 3 and 4 Chelsea House, Publishers New York and London 1969)

Epilogue

Since the last decision in the "New York Times family" there has been another Supreme Court decision relating to this issue, and there may be a very important one in the near future.

A 1985 Supreme Court decision in Dunn and Bradstreet v. Greenmoss Builders stated that there was a difference between "private concern" and "public concern" in regards to the "actual malice rule." The defendant had not attempted to claim that they were a part of the news media (the libel was published in a credit agency newsletter) but that the protection extended beyond members of the news media. The Court neglected to rule on this issue and instead developed the private concern/public concern distinction. What is most interesting about this case however, was a comment made by Associate Justice Lewis Powell, with which Chief Justice Warren Burger agreed. The comment, included in the opinion, was that perhaps the Court should "reconsider" the New York Times v. Sullivan decision because it made it too difficult for libeled public officials to clear their good names. (Neither Burger nor Powell were on the Court when the 1964 ruling was handed down.)

Now there is a case which just may give the Court that opportunity for which they are looking. It is Tavoulareas v. Washington Post. The full U.S. Circuit Court of Appeals voted 7-2 in June 1985 to rehear the case. That vote overturned a 2-1 vote by a federal panel in April 1985 to award Tavoulareas $2 million.

The case stems out of a November 30, 1979 article by Post reporter Patrick Tyler. It said that William P. Tavoulareas, retired Mobil Oil Company president, "set up his son" in a London shipping management firm which through an intermediary operated some of Mobil's ships.

The three judge panel ruled that the Washington Post was a newspaper which seeks, among other things, "hard-hitting investigative stories," and that such a policy of "sophisticated muckraking" could provide a "motive for knowing or reckless falsehood." (In modern use, the term "muckraker" has two related meanings. Used in the perjorative sense, "muckraker" refers to a journalist who seeks out and publishes allegations of wrongdoing with the intention of creating ascandal. In the positive sense, the term implies diligence and a capacity to dig deep for the facts).

The impending retirement of Chief Justice Warren Burger creates an interesting situation for the news media as well. President Reagan has nominated Associate Justice William Rehnquist to replace Burger as Chief Justice; Rehnquist's position will be taken over by Antonin Scalia, currently a judge on the U.S. Court of Appeals for the District of Columbia. Scalia was the one who wrote the original decision in April 1985

awarding Tavoulareas $2 million. He would be prohibited from participating in this particular decision when it almost certainly reaches the high court (since he participated in the case as a lower court judge), but the overall situation does not look very good for the news media in the near future.

If this occurs, it would represent the completion of the negative feedback loop which began in 1964. Then libel law will be returned to the pre-Sullivan concept of strict liability. Then the information system would return to a state of equilibrium (the news media will no longer have a "special defense"). However, this situation would indeed produce the "chilling effect" on the news media which the studies cited here said was still a possibility and the cybernetics model predicted would occur.